

STATE OF MICHIGAN  
COURT OF APPEALS

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JOANN COOPER-REID,

Plaintiff-Appellee,

v

STATE OF MICHIGAN THIRD JUDICIAL  
CIRCUIT,

Defendant-Appellant.

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UNPUBLISHED

March 20, 2007

No. 269254

Wayne Circuit Court

LC No. 02-229903-CZ

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

The trial court denied defendant's motion for summary disposition in this case involving a claim for unlawful retaliation in violation of the Michigan Civil Rights Act, MCL 37.2701 *et seq.* This Court originally denied defendant's application for leave to appeal in Docket No. 260962, but our Supreme Court subsequently remanded the case to this Court for consideration as on leave granted. *Cooper-Reid v State of Michigan*, 474 Mich 1084; 711 NW2d 41 (2006). We affirm.

Because this Court originally considered and denied defendant's application for leave to appeal the December 13, 2004, order, and our Supreme Court subsequently remanded the case to this Court for consideration as on leave granted, this Court has jurisdiction to review the December 13, 2004,<sup>1</sup> order pursuant to our Supreme Court's remand order.

Plaintiff, an African American female, filed this action alleging that she was constructively discharged from her employment with defendant, who allegedly retaliated against her for filing a prior race discrimination action. Plaintiff began her employment with defendant in the Common Pleas Court in 1978, and held various positions in the court until her retirement in 2002.

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<sup>1</sup> We address the December 13, 2004 order as opposed to the trial court's January 28, 2005, order denying defendant's motion for reconsideration, which plaintiff asserts is the only ruling at issue here.

In September 1996, plaintiff requested a medical leave of absence because she broke her leg. Plaintiff's original application for paid medical leave requested a leave of absence from September 2, 1996 to October 31, 1996; a second application requested the period October 30 through December 1, 1996, and a third requested April 24 through May 31, 1996.<sup>2</sup> All three were signed by plaintiff and approved by Richard Schutt as Supervisor and Susan Zakzrewski as Department Head. Plaintiff provided documents signed by her physician indicating her continuing disability for the time periods October 30-November 30, 1996, November 27-December 31, 1996, January 1-February 28, 1997, February 27-April 4, 1997, April 4-May 31, 1997.

During the medical leave, plaintiff took classes at the University of Michigan and also did fieldwork, which consisted of working for social service agencies, in pursuit of her MSW degree, which she obtained in 1997.<sup>3</sup> Zakzrewski stated in her deposition that plaintiff had told her she was attending classes while on medical leave. Zakzrewski stated that she did not discipline plaintiff; she explained that she informed the Friend of the Court, Gerhardt Ritsema, of plaintiff's school attendance, and he did not instruct her to take any action.

In March 1998, plaintiff applied for a promotion to domestic relations supervisor, but was informed that she was not selected for the position because of poor performance. In December 1998, plaintiff filed a complaint with the Michigan Department of Civil Rights (MDCR) alleging that she was denied the promotion due to her race. Plaintiff alleged that 10 persons had applied for supervisor positions; all five white applicants were promoted, but none of the five African American applicants were promoted. In August 1999, plaintiff was promoted to the position of domestic relations supervisor in partial resolution of her MDCR complaint.

However, in August 2001, plaintiff filed a lawsuit against defendant in circuit court (*Cooper-Reid I*). In her October 2001, amended complaint, plaintiff alleged a violation of the Michigan Civil Rights Act based on the denial of a promotional opportunity from July 27, 1998, through August 9, 1999.

After plaintiff initiated *Cooper-Reid I*, defendant's counsel, Thomas Marshall, conducted a review of the file and became aware of plaintiff's school attendance during her 1996-1997 medical leave. In March 2002, Marshall began to investigate plaintiff's medical leave.

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<sup>2</sup> The case file includes a request for unpaid leave, for the period October 2, 1996 through June 30, 1997, signed by Department Representative Helen Battson on April 23, 1997, but not signed by plaintiff. The trial court opinion noted that "In September 1996, Plaintiff injured her leg and took a paid medical leave until June 1997." This finding was not challenged by either party, so it appears the request for unpaid leave was superseded by the paid medical leave.

<sup>3</sup> Plaintiff testified that the University provided her with assistance, such as handicap faculty parking, shuttle transportation, some flexible class attendance, and help finding flexible field work assignments. Plaintiff also stated that she did not request such assistance from defendant because she had never known the court to provide it before, and because when she explained her situation to her supervisor, no such assistance was offered.

On April 1, 2002, defendant's Administrator of Human Resources, William Lawrence, was deposed. Although Lawrence did not work for defendant during the time period of plaintiff's medical leave, he indicated in his deposition that if he had been Administrator at that time, he would have fired plaintiff because he viewed her actions as "fraud." According to the deposition testimony of both plaintiff and her attorney, Lawrence also made the comment at his deposition, though off the record, that he would have "fired [plaintiff's] ass" if she was going to school while on medical leave.

The parties went to case evaluation on April 22, 2002, after which plaintiff's counsel received a fax of defendant's motion for leave to file a counterclaim to assert a claim of fraud against plaintiff, for her actions in attending classes and working while on a paid medical leave.<sup>4</sup>

On April 29, 2002, plaintiff completed paperwork for the State Employees' 2002 Early Out Retirement, and submitted it before the April 30, 2002, deadline

On May 21, 2002, plaintiff attended a meeting with union representative Lawrence Verbiest and Administrator of Human Resources, William Lawrence. In his deposition, Verbiest stated that during this meeting, Lawrence expressed concern that plaintiff unlawfully collected payment while on her medical leave, threatened her with criminal prosecution, and indicated that defendant "was going after [plaintiff]." Verbiest also stated that after this meeting, he wrote a letter to Lawrence stating that "it is inconceivable that the court would even consider disciplinary action against our member, Ms. Jo Ann Cooper-Reid, based upon events occurring in September and October of 1996" and that to do so "would be to discipline without just cause and clear retaliation and further discrimination because of her pending lawsuit."

Nonetheless, on June 18, 2002, Lawrence sent a memorandum to plaintiff, noting in part:

The Court [plaintiff's employer, the Third Judicial Circuit] believes that you were not disabled during the period September 1996 through May 1997 as you alleged and your claim to have been disabled during that period was dishonest, deceptive and fraudulent. This writing serves as an expression of the Court's disapproval of your conduct. More severe discipline while warranted will not be imposed only because you have indicated that you will retire soon.

This writing shall be placed in your personnel file and kept there for the time period permitted by law, and the Court will authorize its attorneys to seek reimbursement of those monies paid to you as a result of your deceptive and fraudulent conduct.

In August 2002, plaintiff filed this lawsuit against defendant and William Lawrence. Plaintiff's November 1, 2002, first amended complaint alleged retaliation under the CRA in

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<sup>4</sup> Defendant's motion was set for hearing in the Wayne Circuit Court, but was never heard because the assigned judge disqualified herself and, after the case was reassigned to Judge Kuhn, defendant did not pursue the motion.

count one, and abuse of process by Lawrence in count two.<sup>5</sup> Plaintiff asserted that she experienced an adverse employment action when defendant threatened to discipline and prosecute her for allegedly submitting a false claim for disability benefits, manufactured evidence in support of its threats, publicly referred to her disability claim as fraudulent, and pursued a fraud counterclaim, although it was fully aware that plaintiff's supervisors were aware of and approved of her school attendance. Plaintiff claimed this conduct created intolerable working conditions, which resulted in her filing for an early retirement. Plaintiff also asserted that an adverse employment action resulted when defendant actually disciplined her by placing the June 18, 2002, memorandum in her personnel file. In the meantime, plaintiff retired, effective October 1, 2002.

Defendant filed a motion for summary disposition, arguing that plaintiff's retaliation claim failed because there was no constructive discharge and no causal connection between its actions and plaintiff's filing of *Cooper-Reid I*. Defendant further argued that even if plaintiff established a prima facie case of retaliation, she could not show that defendant's reason for pursuing the medical leave issue, i.e., a legitimate attempt to defend the lawsuit and to insure the integrity of its personnel policies, was a pretext for retaliation.

The trial court denied defendant's motion,<sup>6</sup> finding there was an issue of fact regarding causation. The court noted that the acts of retaliation occurred approximately six months after the filing of *Cooper-Reid I*, that defendant irregularly pursued the leave issue many years after it occurred, that defendant did not investigate before seeking leave to file a counterclaim, and that defendant dropped the issue once plaintiff's retirement was confirmed. The court further concluded that there was an issue of fact whether defendant constructively discharged plaintiff, based on defendant's threats of discipline and prosecution, and filing of a counterclaim. Finally, the trial court concluded that while defendant articulated valid reasons for the pursuit of the medical leave issue, plaintiff had raised an issue of fact whether defendant's proffered explanations were worthy of credence.

Defendant filed an application for leave to appeal, which this Court denied, and a motion for reconsideration, which this Court also denied. Defendant then filed an application for leave to appeal with the Michigan Supreme Court, which, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted.

Defendant's motion for summary disposition was brought under MCR 2.116(C)(10). As this Court stated in *O'Donnell v Garasic*, 259 Mich App 569, 572-573; 676 NW2d 213 (2003):

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<sup>5</sup> Lawrence was dismissed as a defendant in October 2004.

<sup>6</sup> On January 28, 2005, the court issued an opinion and order amending its December 13, 2004, opinion and order (to correct a typographical error), and denying defendant's motion for reconsideration.

A trial court's grant or denial of summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed in the light most favorable to the party opposing the motion. Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. [Citations and quotation marks omitted.]

The underlying complaint alleged unlawful retaliation in violation of the Michigan Civil Rights Act. MCL 37.2701 provides:

Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

A prima facie case of retaliation under the CRA requires proof that: (1) the plaintiff engaged in a protected activity, (2) this was known by the defendant, (3) the defendant took an employment action adverse to the plaintiff, and (4) there was a causal connection between the protected activity and the adverse employment action. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

In this case, plaintiff clearly engaged in an activity protected under the CRA, and this was clearly known by the defendant. The questions are whether defendant's actions may be considered adverse employment actions, and then whether they are casually linked to plaintiff's legal action against defendant.

Determining whether an employer's action constitute an adverse employment action requires inquiry into the unique facts and circumstances of the particular situation; there is no bright-line guide as to what is or what is not an adverse action:

Although there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *Pena, supra* at 312.

Similarly, the causation issue requires close scrutiny of the particular facts of the matter, evaluated with an eye to what the reasonable fact-finder could find:

To establish causation, the plaintiff must show that his participation in activity protected by the CRA was a 'significant factor' in the employer's adverse

employment action, not just that there was a causal link between the two. A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a reasonable fact-finder to infer that an action had a discriminatory or retaliatory basis. [*Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004) (internal citation omitted)]

Plaintiff alleges that she suffered an adverse employment action because defendant constructively discharged her by threatening her with prosecution and discipline, seeking to file a fraud counterclaim, and initiating disciplinary proceedings against her based on her alleged misuse of medical leave. We are particularly persuaded that William Lawrence's comment, made either to or in front of plaintiff, that he would have "fired [plaintiff's] ass" set a tone so hostile that any reasonable employee, similarly situated, might feel compelled to resign rather than continue to suffer such unacceptable conduct from an employer.

We find that, at a minimum, a question of fact exists as to whether plaintiff suffered an adverse employment action.

Accepting as true the documentary evidence filed at the time of the hearing on the summary disposition motion, we have plaintiff's statement that she informed her supervisor that she was continuing her education while on paid medical leave, and we have the deposition testimony of Department Head Susan Zakzrewski that she had indeed been so informed by plaintiff and had taken no action. Weighing against that testimony, we have only the statement of Administrator of Human Resources, William Lawrence that, had he been employed by defendant at that time, he would have fired plaintiff. Of course, he was not. Given these very specific facts, it appears that plaintiff was harassed and threatened over conduct which had either been explicitly or, at least, implicitly, authorized by her employer. Plaintiff alleges that these actions led to her constructive discharge.

If constructive discharge is established, a plaintiff employee is "treated as if their employer had actually fired them. The decision to terminate in a constructive discharge case, therefore, is imputed to the employer." *Champion v Nationwide Sec*, 450 Mich 702, 710; 545 NW2d 596 (1996). Whether constructive discharge has been established is generally a question of fact:

A constructive discharge is established where an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign. Where reasonable persons could reach different conclusions regarding whether these elements are established, the issue becomes a question of fact for the jury and not one properly decided by the trial court. [*Vagts v Perry Drug Stores*, 204 Mich App 481, 487-488; 516 NW2d 102 (1994) (internal citation omitted)].

We find here that there is, at a minimum, a question of fact as to whether defendant's actions in threatening legal action against plaintiff led to constructive discharge and therefore constituted adverse employment actions.

However, even assuming there was an adverse employment action, plaintiff still must prove causation to prevail. Defendant maintains that, while conducting discovery in the race discrimination action, it learned that while plaintiff was on paid medical leave in 1996 and 1997, she actually attended a full load of classes at the University of Michigan and did fieldwork for some social service agencies. Defendant asserts the threat of action against plaintiff was not retaliation, and its underlying reason, to address the alleged fraud, was not pretext. There was no causal connection between defendant's actions and plaintiff's CRA claim.

The trial court ruled that there was an issue of fact regarding causation. The court noted that the acts of retaliation occurred approximately six months after the filing of *Cooper-Reid I*, and found that defendant's pursuit of the leave issue many years after it occurred appeared irregular. The court found that defendant failed to properly investigate before seeking leave to file a counterclaim, noting specifically that defendant did not interview the persons who had been plaintiff's supervisors at the time of the medical leave, and therefore the only persons with firsthand knowledge of the circumstances. And the court found it significant that defendant dropped the issue once plaintiff's retirement was confirmed. Rejecting defendant's claim that its stated reasons for the pursuit of the medical leave issue were not pretext, the court concluded: "Plaintiff had raised a genuine issue of material fact that defendant's proffered explanations are unworthy of credence."

We agree that there is sufficient circumstantial evidence here to enable a reasonable factfinder to infer that defendant's actions were retaliatory. *Rymal, supra*. The close temporal proximity between the protected activity and the adverse actions is alone enough to give us pause. Added to that, we agree with the trial court that defendant did not properly investigate the medical leave issue before it began threatening plaintiff with action. Although defendant's counsel sent plaintiff interrogatories and requests for admissions, and obtained plaintiff's medical records and information about her school attendance from the University of Michigan, defendant's counsel failed to discuss the matter with the only persons who could have shed appropriate light on what actually happened, plaintiff's supervisors at the time of the medical leave. For example, Susan Zakzrewski was not deposed until April 20, 2002. We note also that when she was deposed, she testified that she had been aware that plaintiff was continuing her education during her paid medical leave, and had not taken any action.

Viewing, as we must, all of the evidence in the light most favorable to the party opposing the motion, here plaintiff, we find that there are genuine issues of material fact related to adverse employment actions and causation that must be resolved by a trier of fact. Consequently, summary disposition is inappropriate and the trial court correctly denied defendant's motion.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Mark J. Cavanagh  
/s/ Patrick M. Meter